

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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 OCT 13 1998

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Carriage of the Transmissions of)
 Digital Television Broadcast Stations)

CS Docket No. 98-120

Amendments to Part 76 of the)
 Commission's Rules)

To: The Commission

COMMENTS OF CORDILLERA COMMUNICATIONS, INC.

Cordillera Communications, Inc. ("Cordillera") hereby submits its Comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ Cordillera recognizes the importance of the mandatory carriage provisions in Section 614 of the Communications Act of 1934, as amended (the "Act"),² to the economic viability of television broadcast stations, especially for those stations in relatively small markets. Cordillera is a wholly owned subsidiary of Evening Post Publishing Company based in Charleston, South Carolina. Various Cordillera subsidiaries own and operate ten VHF stations licensed to communities in Arizona, Colorado, Idaho, Louisiana, Montana, and Texas.³ Cordillera urges the Commission to adopt mandatory carriage of local

¹ *Notice of Proposed Rulemaking*, CS Docket No. 98-120, FCC 98-153 (released July 10, 1998) ("Notice").

² 47 U.S.C. § 534 (1997).

³ The stations are: KVOA-TV (Tucson, AZ), KOAA-TV (Pueblo, CO), KIVI-TV (Nampa, ID), KATC-TV (Lafayette, LA), KTVQ-TV (Billings, MT), KCTZ-TV (Billings, MT), KXLF-TV (Butte, MT), KRTV-TV (Great Falls, MT), KPAX-TV (Missoula, MT),

broadcast stations' digital television ("DTV") signals consistent with the Act and the sound public policies promoted therein.

I. THE ACT REQUIRES MANDATORY CARRIAGE OF DIGITAL TELEVISION SIGNALS.

The Cable Television Consumer Protection and Competition Act of 1992⁴ ("1992 Cable Act") requires cable systems to carry all local commercial television stations in their market. The 1992 Cable Act twice has withstood the scrutiny of the Supreme Court.⁵ Few other statutes can claim as an extensive accompanying record complied by such high levels of government. The mandatory carriage provisions and their underlying policies solidly stand as furthering important government interests of preserving the benefits of free, over-the-air local broadcast television and promoting the widespread dissemination of information from a multiplicity of sources.⁶

In the 1992 Cable Act, Congress charged the Commission with initiating this proceeding:

ADVANCED TELEVISION. At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems *necessary to ensure cable carriage of such broadcast signals of local commercial television*

and KRIS-TV (Corpus Christi, TX)

⁴ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 US 622 (1994) ("*Turner I*") (determining intermediate scrutiny applied); *Turner Broadcasting System, Inc. v. FCC*, 117 S.Ct. 1174 (1997) ("*Turner II*") (upholding must-carry provisions).

⁶ *Turner II*, 117 S.Ct. at 1186.

stations which have been changed to conform with such modified standards.⁷

Congress leaves little doubt in this section that the Commission's task is to "establish any changes . . . necessary to ensure cable carriage of [DTV] signals." When the intent of Congress is clear, "that is the end of the matter; for . . . the agency must give effect to the unambiguously expressed intent of Congress."⁸

If Congress intended to exclude DTV signals from mandatory carriage obligations, it would have done so explicitly as it did with DTV's ancillary and supplementary services.⁹ The Commission initiated its Advanced Television docket five years prior to passage of the 1992 Cable Act,¹⁰ and Congress, demonstrably aware of the transition to digital television, chose only to exclude ancillary and supplementary services from mandatory carriage. Accordingly, the Commission is bound to adopt DTV must carry.

The Commission is not permitted to consider the so-called "No Must Carry Proposal" listed in the *Notice*.¹¹ To support the possibility that the "No Must Carry Proposal" be considered, the Commission cites NCTA's argument that the phrase "have been changed" in Section 614(b)(4)(B) refers to the term "signals" and that mandatory carriage of the digital signal thus would not start until the transmission of analog signals

⁷ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

⁸ *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

⁹ 47 U.S.C. § 336(b)(3).

¹⁰ Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, *Notice of Inquiry*, 2 FCC Rcd 5125, MM Docket No. 87-268 (1987).

¹¹ *Notice* at ¶50.

have ceased. This interpretation is not supported by accepted principles of statutory construction. As mentioned, if Congress wished to exclude DTV signals, it would have done so explicitly. Furthermore, NCTA's interpretation fails under scrutiny. The more reasonable interpretation is not that the phrase ("have been changed") refers back to the term "signals" but instead refers to the immediately preceding term (*i.e.*, "stations"). Thus constructed, Section 614(b)(4)(B) is then understood "to ensure cable carriage of [DTV] signals of [*changed*] local commercial television stations." Accordingly, once a local broadcaster changed its station to commence digital transmissions, mandatory carriage of the DTV signal must be ensured without delay. This reading is consistent with the plain meaning of the text in Section 614(b)(4)(B) and with the absence of any explicit exclusion of DTV signals from mandatory carriage.

II. MUST CARRY'S POLICIES ARE HEIGHTENED BY DIGITAL TELEVISION.

The "Immediate Carriage Proposal"¹² is the most reasonable statutory construction. The proposal best advances the important government interests Congress and the Supreme Court said that the must carry provisions properly are intended to further. In adopting must carry, Congress concluded that the cable operators had an economic incentive and technical capability to refuse carriage or disadvantage a local broadcaster¹³ and believed that the "economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."¹⁴ Congress believed that the mandatory

¹² Notice at ¶41.

¹³ 1992 Cable Act, § 2(a)(15).

¹⁴ 1992 Cable Act, § 2(a)(16).

carriage rules would prevent “a reduction in the number of media voices available to consumers.”¹⁵ In its review of the must carry provisions, the Supreme Court identified that “‘protecting noncable households from loss of regular television broadcasting service due to competition from cable systems’ is an important federal interest”¹⁶ and that there is a corresponding “governmental purpose of the highest order in ensuring public access to a multiplicity of information sources.”¹⁷

To further these interests during the DTV transition, none of the Commission’s proposals are better suited than Immediate Carriage. As the Commission posits, the shared purpose of the must carry provisions and the DTV implementation is the “continued availability of free over-the-air television broadcast service.”¹⁸ Yet DTV creates a significant economic challenge for broadcasters, and a successful DTV roll-out is not guaranteed. Serious technical problems with DTV exist and viewers may likely be averse to the new technology if required to rely on 30-foot antennas or the like for reception purposes. Immediate DTV cable carriage would assure viewers that their investment in a DTV receiver will be rewarded and, similarly, would assure stations that *their* investment in the DTV roll-out, substantial though it is, will not have been for naught.

Moreover, DTV presents cable operators with the familiar incentive to disadvantage local stations. Cable operators, competing with television stations for advertising, have

¹⁵ 1992 Cable Act, § 2(a)(4).

¹⁶ *Turner II*, 117 S.Ct. at 1186 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

¹⁷ *Id.* (quoting *Turner I*, 512 US at 663).

¹⁸ *Notice* at ¶43.

incentives to delay DTV carriage both to block broadcasters' potential revenue streams and to minimize any DTV-advantage to local stations until affiliated cable networks upgrade to the higher-quality DTV format. Cable operators also are aware of broadcasters' economic vulnerability during the DTV transition and may threaten more easily stations' economic viability — the precise concern mandatory carriage provisions are intended to protect.

III. SMALL MARKET STATIONS NEED MUST CARRY PROTECTION.

Stations in small markets are important beneficiaries of the must carry provisions. Vertically and horizontally integrated cable systems hold economic advantages that small market stations cannot emulate. Mandatory cable carriage of small market stations has been critical to broadcasters' economic success. The importance of must carry for these stations will be heightened during the DTV transition. Small market broadcast stations face the same fixed costs that will result from the DTV roll-out as do the large market stations. These fixed conversion costs are substantial,¹⁹ cannot be avoided, and necessarily will create a greater burden on stations in smaller markets. The Commission attempted to mitigate effects of this economic reality by extending the DTV construction deadline for small market stations. Nonetheless, small market stations disproportionately will incur increased risk to their economic viability as a result of the DTV transition. By imposing mandatory DTV carriage, however, the risk to small market television broadcast stations will be reduced. Mandatory carriage of the DTV signals will be critical to the success of digital television in small markets.

¹⁹ Estimates of the DTV conversion cost continue to rise. Sinclair Broadcasting recently estimated DTV conversion cost will be between \$5-\$9 million per station. COMMUNICATIONS DAILY, Sept. 18, 1998, at 12.

The Commission explicitly recognizes the impact of DTV must carry on small market cable systems and openly questions whether must carry provisions should equally apply.²⁰ The Commission makes little note, however, of what effect the absence of DTV must carry will have on small market television stations. Yet Congress already has provided the Commission with ample direction on accommodating the interests of small cable operators by its exclusion of must carry obligations from operators having fewer than 300 customers and its reduction of obligations for those with 12 or fewer usable activated channels.²¹ It would be unreasonable for the Commission now to tilt the balance Congress struck between the interests of small market television stations and cable operators.

Indeed, small market cable operators will be accommodated during the DTV transition. Operators should not be required to carry DTV signals until the first DTV station in the local community commences transmissions. With television stations in smaller markets not required to complete construction of their DTV facilities until 2002, small cable systems have as much time as small television stations to upgrade. Moreover, nothing suggests that the one-third capacity limit on mandatory carriage of local broadcasters will be obviated by the DTV transition.²² Small cable systems already may have exhausted their capacity and would not be affected necessarily by the DTV roll-out.

²⁰ *Notice* at ¶¶52-53.

²¹ 47 U.S.C. §534(b)(1)(A).

²² Cable systems are not required to dedicate more than one-third capacity for must carry purposes. The Commission stated in the *Notice* that the one-third capacity limit in Section 614(b)(1)(B) should still be applicable in the DTV transition. *Notice* at ¶51.

IV. THE MATERIAL DEGRADATION REQUIREMENT PROTECTS LOCAL BROADCASTERS' DTV SIGNALS FROM DISCRIMINATORY TREATMENT.

Cable operators cannot materially degrade the signals of local broadcasters.²³ The Commission must ensure that the quality of local broadcasters' signal carriage is no less than that provided by any other signal on the system, to the extent technically possible.²⁴ Congress makes clear that cable operators cannot disadvantage local commercial broadcast stations through technical means, and the implementation of digital television does not lessen that requirement.

Accordingly, once a cable operator carries a cable programming service in, *e.g.*, the 1080i HDTV format, then the DTV signals of local broadcasters must be carried, without material degradation, if they provide 1080i HDTV signals. Cable systems must not materially degrade local broadcasters' DTV signals or act to discriminate against broadcasters through technical means simply because of the implementation of digital television. Congress created no "DTV exclusion" to the material degradation provision.

Conclusion

The Commission's actions in this proceeding will have important long-term consequences for the economic viability of local broadcast television stations, especially for those in smaller markets. Congress did not distinguish between analog and digital formats in enacting the must carry provisions — and neither can the Commission. The Commission should not grant cable systems a new opportunity to disadvantage local

²³ 47 U.S.C. § 534(b)(4)(A).

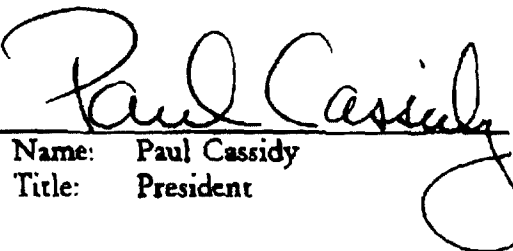
²⁴ *Id.*

television stations during this important transition to DTV. For the reasons described, Cordillera urges the Commission to ensure the mandatory carriage of the digital signals of local broadcast television stations in the swiftest manner possible.

Respectfully submitted,

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October 13, 1998